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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-332

RICHARD R. SATTERWHITE, JR., for himself and on behalf of all other persons similarly situated,
Petitioner

v.

UNITED PARCEL SERVICE, INC.

Petition For A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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The petitioner, Richard R. Satterwhite, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this case on May 3, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) [1] is reported at 496 F.2d 448, and unofficially reported at

[1] "App." refers to the appendix to this petition; "R" refers to the Joint Appendix filed in the court of appeals.

74 CCH Lab. Cas. ¶ 33,068 and 21 Wage & Hour Cas. 747. The opinion of the District Court for the District of Colorado (App. 9a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1974. A timely application for an extension of time in which to file a petition for writ of certiorari was granted, extending the time to September 23, 1974. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether invocation of the grievance arbitration procedures of a collective bargaining agreement, which resulted in an award of straight time pay for overtime hours, precludes the affected employees from maintaining an action under Section 16(b) of the Fair Labor Standards Act to recover the additional one-half time compensation due to them under the Act, together with an equal amount as liquidated damages, a reasonable attorney's fee, and costs?

STATUTES INVOLVED

Sections 7(a)(1) and 16(b) of the Fair Labor Standards Act, 52 Stat. 1060, *et seq.*, as amended, 29 U.S.C. 207(a)(1) and 216(b), provide as follows:

> Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above

specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

SEC. 16.(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained [against any employer (including a public agency)] in any [Federal or State] court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.[2]

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[2] The bracketed words were added to Section 16(b) by the Fair Labor Standards Amendments of 1974, Section 6(d)(1), Pub.L. No. 93-259.

STATEMENT

This action was brought under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, on behalf of the plaintiff and other employees similarly situated, to recover unpaid overtime compensation required by Section 7(a)(1) of that Act and for an equal amount as liquidated damages, plus attorney's fees and costs. Fifty-eight employees joined as parties plaintiff. On an agreed factual record (R. 107), the district court entered judgment for defendant on the ground that plaintiff's suit was precluded by a previous arbitration decision made under the provisions of a collective bargaining agreement (R. 108-111). The court of appeals affirmed (App. 8a).

Respondent operates a parcel delivery service. Until December 29, 1970, respondent's employees began their workday at 8 a.m. and ended it at 4:30 p.m. This interval of 8½ hours included one hour per day of inactive time, an unpaid lunch period of 30 minutes and two 15-minute rest periods (one in the morning and the other in the afternoon) (R. 35).

On December 29, 1970, respondent unilaterally increased its employees' scheduled workday from 8½ hours to 9 hours (8 a.m. to 5 p.m.). No additional inactive time was provided for by this change. Accordingly, the employees' workweek and actual working time was increased by 2½ hours per week, while their pay remained unchanged (R. 35, 50). Employees other than truck drivers were instructed that they would be required to use their one hour per day as an unpaid "lunch period."[3] Truck drivers were re-

[3] In practice, the employees other than truck drivers could take their one hour of inactive time as "part lunch and part 'breaks'" (Brief of respondent as appellee below, at p. 2).

quired to take their hour "in one or more segments, at the employee's discretion, if circumstances permit" (R. 35). The expressed purpose of this change was "to increase production * * * and reduce our losses" (R. 50).

The complaint in this case alleges that, under the Fair Labor Standards Act, petitioners are entitled to receive compensation for 42½ hours per week and that, by virtue of Section 7(a)(1) of that Act, 2½ hours of that time must be paid at premium rates. This allegation is based upon petitioner's contention that the employer's pay obligations under the Act extend to inactive periods required by him, predominantly for his own benefit, in his scheduling of the day's work [4] and, in the case of the truck drivers, to fortuitous short intervals of slack time when they must remain immediately available for resumption of work, but may otherwise make personal use of the time, if and to the extent that "circumstances permit." [5] The district court did not decide this legal issue because it concluded that petitioners' suit was precluded by the prior decision of an arbitrator made under the terms of a collective bargaining agreement between respondent and petitioners' union (R. 109-111). The court of appeals observed with regard to this issue that "FLSA § 7(a)(1) provides for pay at 1 and ½ times the straight rate * * *. This differs from the arbitration award * * *" (App. 3a).

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[4] See *Goldberg* v. *Aeromotive Metal Products, Inc.*, 312 F.2d 728 (C.A. 9); *Mitchell* v. *Turner*, 286 F.2d 104 (C.A. 5); *Mitchell* v. *Greinitz*, 235 F.2d 621 (C.A. 10); 29 C.F.R. §§ 785.18, 785.19.

[5] See *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Willmark Service System, Inc.* v. *Wirtz*, 317 F.2d 486 (C.A. 8); *Wirtz* v. *Sullivan Lumber Co.*, 326 F.2d 946 (C.A. 5); 29 C.F.R. §§ 785.16(b), 785.17.

The arbitration award in question resolved grievances which had been filed by respondent's employees as a result of the unilateral change in its employees' work schedule. The grievances were submitted to arbitration under a provision of the collective bargaining agreement providing for the arbitration of disputes "involving the interpretation, construction, intent, or meaning of this Agreement" (Art. 16, R. 47-48). The arbitration submission referred the arbitrator to specific articles of the collective bargaining agreement including, in particular, Article 5 which required pay at "time and one-half" for hours over 40 in the week or over 8 in the day "exclusive of lunch periods"(R.46). The arbitrator was asked to decide, *inter alia*, whether the union had acquiesced in the change of schedule, and if not whether respondent had "the right to take such action" (R. 45-46).

The arbitrator ruled that the Union had not acquiesced in the change (R. 45). He ruled further that the paid rest periods were "for the obvious advantage to the Company" and were "in effect, part of the Union contract," and that they could not be withdrawn without the Union's consent (R. 65). He accordingly concluded that the employees were entitled to be paid for 42½ hours per week, from December 25, 1971, the day the employer changed the work schedule, to September 15, 1971, the day the Union contract expired (R. 68).

In a supplementary decision, the arbitrator ruled that the additional half-hour per day for which wages were due should be paid at regular rates and not at overtime rates, even though they were for hours in excess of 40 in the week (R. 76). The express ground was that to require overtime rates "would exact a

penalty from the Company," which would not be warranted since the Company had acted in good faith "according to its interpretation of the labor agreement" (R. 77). The arbitrator also denied interest on the wage deficiencies because, among other reasons, there was no "language in the Labor Agreement" authorizing the payment of such interest (R. 78).[6] Nowhere in the arbitrator's decisions is any reference made to the Fair Labor Standards Act or to the case law thereunder (R. 45-81).

The instant suit is not based on the Union contract but on the requirement of Section 7(a) of the Fair Labor Standards Act, that for all hours worked in excess of 40 in the week, the rate of compensation must be one and one-half times the employee's regular rate of pay (Cplt., R. 22-23). The district court, however, relying on the Tenth Circuit's opinion in *Alexander* v. *Gardner-Denver Co.*, 466 F.2d 1209, *reversed*, 415 U.S. 36, held that the arbitrator's decision, although limited to the terms of the contract, was nonetheless determina-

[6] The other reasons were that the obligation of the Company was not liquidated; that the evidence did not show that the Company "acted deliberately to injure the grievants"; and that interest would, in any event, only be awarded for the period between the date the formal demand for interest was made and the date the award is satisfied. Section 11 of the Portal-to-Portal Act (29 U.S.C. 260) requires a court in a Section 16(b) suit to award liquidated damages in an amount equal to the unpaid wages due except that "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act," the court has discretion to grant less than the full amount of liquidated damages. The award must, however, at least equal the amount of interest due. See, e.g., *Wright* v. *Carrigg*, 275 F.2d 448, 449 (C.A. 4); *McClanahan* v. *Mathews*, 440 F.2d 320, 322 (C.A. 6).

tive of the obligations imposed by the Act (R. 110-111). Accordingly, it entered judgment for the defendant without passing on the merits of the legal issues raised by the complaint (App. 13a).

Despite this Court's reversal of *Gardner-Denver*, the court of appeals affirmed (App. 8a). It held that when a wage dispute is submitted to arbitration under a collective bargaining agreement, the employees may not thereafter maintain a suit under Section 16(b) of the Fair Labor Standards Act "on the basis of the same factual occurrence as that presented to the arbitrator" (App. 8a). With respect to the overtime premiums due for the time held by the arbitrator to be compensable, the court of appeals said, "It is reasonable to infer that the arbitrator compromised by giving the employees all the time which they sought while deciding the rate of pay in favor of the company" (App. 3a). The Fair Labor Standards Act contains no provision for discretionary remission of overtime premiums due under Section 7(a)(1).

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with this Court's holding in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, that resort to the arbitration grievance procedure does not bar an employee from pursuing in court a statutory claim under Title VII of the Civil Rights Act. It also conflicts with the rulings by this and other courts that rights under the Fair Labor Standards Act cannot be diminished by collective bargaining agreements or by private agreements between employers and employees (*Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697; *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139 (C.A. 5), certiorari denied, 409

U.S. 948), and that the courts cannot relieve an employer of his statutory obligations under the Act, unless he "proves that the act or omission * * * was [committed] in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of * * * the Administrator of the Wage and Hour Division of the Department of Labor" (Portal-to-Portal Act of 1947, 29 U.S.C. 259; see *Hodgson* v. *Square D Co.*, 459 F.2d 805 (C.A. 6), certiorari denied 409 U.S. 967; *King* v. *Board of Education of Chicago*, 435 F.2d 295 (C.A. 7), certiorari denied, 402 U.S. 908).

The decision below, if left unreviewed, will not only have far reaching effects upon the thousands of organized employees in this country, but it will also unsettle a large and important area of law which had previously been regarded as settled.

1. The conflict between the decision below and this Court's opinion in *Gardner-Denver* is no less direct because suit here involved rights under the Fair Labor Standards Act and not under Title VII of the Civil Rights Act.[7] In nonetheless attempting to make this distinction, the court below relied on the untenable ground that wage and hour disputes under the Fair Labor Standards Act present no issue which requires public policy considerations. Clearly, however, the Fair Labor Standards Act is concerned with more than simply adjustment of the working relationship of particular employees and their employer. It has a public purpose which, in the case of Section 7

[7] Indeed, the considerations which this Court found determinative in *Gardner-Denver* are in some respects even more compelling in this case where the only issue is one of statutory construction based upon contested facts.

(the maximum hours provision), is "to spread employment by placing financial pressure on the employer through the overtime requirement." *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 40; see also *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 576-578; *Roland Company* v. *Walling*, 326 U.S. 657, 669-670. To accomplish this purpose, the standards in Section 7 (and in the minimum wage provisions) are to be applied uniformly so that no employer gains an unfair advantage over his competitor. See *Brooklyn Bank* v. *O'Neil*, *supra*, 324 U.S. at 710. If, however, compliance with these standards can be submitted to binding arbitration, uniformity will not be possible and the public policy of the Act will be seriously impaired.[8]

In recognition of this public policy and of the need for uniformity in the Act's enforcement, the courts have consistently ruled that rights under the Act cannot be waived or diminished by private contract or by collective bargaining agreement. See *Brooklyn Savings Bank* v. *O'Neil*, *supra*, where this Court reversed the denial of liquidated damages in two suits where the employees had accepted the payment of back wages and signed statements waiving their right to liquidated damages; and *Coleman* v. *Jiffy June Farms*, *supra*, where the Fifth Circuit affirmed the award of unpaid overtime compensation in a case where the union had induced the employer to discontinue any overtime payments in exchange for other employee benefits. See also *D. A. Schultz, Inc.* v. *Gangi*, 328 U.S. 108;

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[8] It should be noted in this connection that under both Title VII and the Fair Labor Standards Act, the courts, and not any administrative agency, have "the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." See *Gardner-Denver*, 415 U.S. at 44, 56; and *Kirschbaum* v. *Walling*, 316 U.S. 517, 523.

Mitchell v. *Turner*, 286 F.2d 104, 106 (C.A. 5); *Handler* v. *Thrasher*, 191 F.2d 120, 123 (C.A. 10); *Caserta* v. *Home Lines Agency, Inc.*, 273 F.2d 943, 946 (C.A. 2).

2. Equally untenable as a basis for distinguishing this case from *Gardner-Denver* is the lower court's view that the Portal-to-Portal Act of 1947 expressed a Congressional preference for resolving wage and hour matters through the arbitral process. On the contrary, Congress, after considering the impact of the Fair Labor Standards Act on "voluntary collective bargaining" and the settlement of "industrial disputes" (Portal-to-Portal Act, Section 1(a), 29 U.S.C. 251), carved out only a very limited area in which collective bargaining could supplement the wage and hour provisions of the Fair Labor Standards Act.[9]

Under this Act, time spent traveling to and from the place of principal activity, and time spent in activities preliminary or postliminary to the principal activity, are not working time for purposes of Section 7 unless the contract so provides (29 U.S.C. 254). Section 3(o) (29 U.S.C. 203(o)), added by the Fair Labor Standards Amendments of 1949 (63 Stat. 910), defines "hours worked" to exclude "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured

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[9] During the 1938 debates on the Fair Labor Standards Act, Congress rejected an early House bill that would have prohibited the establishment of minimum wage and maximum hours for employees in occupations or industries where a "substantial portion of the employees" were covered by "collective bargaining agreements" and the "facilities for collective bargaining" were adequate to accomplish the purposes of the Act (H.Rept. 1452, 75th Cong., 1st Sess., p. 15; H.Rept. 2182, 75th Cong., 3d Sess., pp. 6-7).

working time during the week involved by the express terms of or by custom or practice under a bona fide collective bargaining agreement." And Sections 7(b), (j) and (k) (29 U.S.C. 207(b), (j) and (k)) provide limited overtime exceptions for certain contractual agreements which compute overtime on the basis of some period longer than one week.

The very specificity with which these exceptions are spelled out precludes any suggestion that the minimum wage and maximum hour provisions of the Fair Labor Standards Act can be modified by the collective bargaining or arbitral process.

3. The decision below incorrectly assumes that "harmony between a union and an individual" can be presumed where claims are made under the Fair Labor Standards Act. As the *Jiffy June* case illustrates, however, a union may be willing to compromise a claim under the Fair Labor Standards Act as the quid pro quo for a concession by the employer on some other matter. And even if the union vigorously supports the employee's claim, arbitrators, whose "specialized competence pertains primarily to the law of the shop" (*Gardner-Denver, supra,* 415 U.S. at 57), are not usually familiar with the large body of decisional law under the Fair Labor Standards Act. Thus, in this case, the arbitrator based his decision that the employees were entitled to additional compensation on "the doctrine of custom and past practice" (R. 67). He did not purport to apply the Fair Labor Standards Act and, as the court below recognized, the arbitrator's decision that compensation for weekly hours over 40 should be at straight time, rather than at premium rates, was squarely contrary to the requirements of the FLSA (App. 3a).

4. The court below, in limiting *Gardner-Denver* to Title VII cases, simply ignores this Court's earlier decisions, holding, in similar contexts, that employees are entitled to direct access to the courts in order to enforce their statutory rights. Thus, in *U.S. Bulk Carriers* v. *Arguelles,* 400 U.S. 351, the Court held that seamen were entitled to sue in federal court for unpaid wages and the statutory penalty without having to exhaust grievance procedures. As Mr. Justice Harlan explained in a concurring opinion, the Court's preference for arbitration applies only to "substantive rights [which] derive solely from the contract" (400 U.S. at 361). When, however, the employees assert rights derived from a federal statute "the presumption of comprehensiveness of the arbitral remedy is * * * rebutted." 400 U.S. at 362.

See also *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 268 (holding that a returning serviceman "was not obliged * * * to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement" before bringing an action in court under Section 9(d) of the Universal Military Training and Service Act, and that this was so even though a determination of the statutory rights asserted by the serviceman "may necessarily involve interpretation of a collective bargaining agreement"); *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432 (reversing a holding that a provision for binding arbitration foreclosed the Board from enforcing the statutory requirement that the company bargain in good faith); *National Labor Relations Board* v. *Marine Workers,* 391 U.S. 418 (holding that an expelled union member could file an unfair labor practice charge with the Board without

having first exhausted his intra-union procedures); and *Thompson* v. *Iowa Beef Packers, Inc.*, 185 N.W.2d 738 (S.Ct. Iowa), certiorari dismissed as improvidently granted, 405 U.S. 228 (holding that employees who had not pursued their contract grievance procedures could nonetheless bring suit under Section 16(b) of the Fair Labor Standards Act to recover unpaid wages due under the maximum hours provisions).[10]

Although the precise issue raised in these cases was whether employees were required by virtue of an applicable collective bargaining agreement to attempt arbitration before pursuing a statutory right (see, *e.g., Iowa Beef, supra,* 185 N.W.2d 738), the Court's holdings clearly indicate its view that employees must be permitted to assert their statutory rights in court, particularly where, as here, those rights are in no way dependent upon or derived from a collective bargaining agreement. As this Court said in *Gardner-Denver, supra,* 415 U.S. at 51-52, "[t]he actual submission of petitioner's grievance to arbitration in the present case does not alter the situation * * * [since] mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."

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[10] This Court granted certiorari (404 U.S. 820) and heard argument on the merits, but then dismissed certiorari as improvidently granted (405 U.S. 228). According to the Court, "the issues as presented by petitioner [employer] provide no occasion to address * * * the question whether, although the statutory claim is not subject to contract arbitration, pursuit of the statutory remedy is nevertheless barred because respondents might have made [their claim] the basis of a grievance for alleged violation of * * * the collective bargaining agreement." 405 U.S. at 230.

CONCLUSION

Because of the decision's clear conflict with *Alexander* v. *Gardner-Denver*, 415 U.S. 36, and because of the evident importance of the question, this petition for certiorari should be granted.

Respectfully submitted,

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